MONTANA LEGISLATIVE HISTORY

Chapter 409 19 95

Bill H 286 S _____ Original bill & history ✓ C

H. Committee on Business & Labor			S. Committee on Business & Industry		
Hearing Date(s)	Jan 26	✓ C	Hearing Date(s)	Mar 08	✓ C
	Jan 27	✓ C			C
		C			C
		C			C
Date Out	Jan 27	✓ C		Mar 08	✓ C

Did this bill originate in an interim committee? ____Yes ____No

Committee _____ Report _____

	TRANSMITTED TO SENATE		
2/03	FIRST READING		
2/03	REFERRED TO STATE ADMINISTRATION		
2/28	HEARING		
3/01	COMMITTEE REPORT—BILL CONCURRED		
3/04	2ND READING CONCURRED	43	0
3/06	3RD READING CONCURRED	49	0
	RETURNED TO HOUSE		
3/07	SIGNED BY SPEAKER		
3/08	SIGNED BY PRESIDENT		
3/09	TRANSMITTED TO GOVERNOR		
3/13	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 135		
	EFFECTIVE DATE: 10/01/95		

HB 285 INTRODUCED BY LARSON, ET AL.

EXEMPT CERTAIN EMPLOYEES OF A LICENSED OUTFITTER FROM COVERAGE UNDER THE STATE OVERTIME LAW

1/19	INTRODUCED		
1/19	FIRST READING		
1/19	REFERRED TO BUSINESS & LABOR		
1/20	FISCAL NOTE REQUESTED		
1/25	HEARING		
1/26	COMMITTEE REPORT—BILL PASSED AS AMENDED		
1/27	FISCAL NOTE RECEIVED		
1/27	FISCAL NOTE PRINTED		
1/28	2ND READING PASSED	96	2
1/30	3RD READING PASSED	95	2
	TRANSMITTED TO SENATE		
1/31	FIRST READING		
1/31	REFERRED TO FISH & GAME		
2/07	HEARING		
2/08	COMMITTEE REPORT—BILL CONCURRED		
3/02	2ND READING CONCURRED	49	0
3/03	3RD READING CONCURRED	46	3
	RETURNED TO HOUSE		
3/07	SIGNED BY SPEAKER		
3/09	SIGNED BY PRESIDENT		
3/09	TRANSMITTED TO GOVERNOR		
3/13	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 114		
	EFFECTIVE DATE: 03/13/95		

HB 286 INTRODUCED BY PAVLOVICH, ET AL.

CLARIFY THAT IT IS AN UNLAWFUL ACT FOR ANY BREWER OR BEER IMPORTER TO COERCE OR PERSUADE A BEER WHOLESALER TO SET A PRICE FOR ANY PRODUCT

1/20	INTRODUCED		
1/20	FIRST READING		
1/20	REFERRED TO BUSINESS & LABOR		
1/26	HEARING		
1/28	COMMITTEE REPORT—BILL PASSED AS AMENDED		
1/30	2ND READING PASSED	97	1
1/31	3RD READING PASSED	95	1
	TRANSMITTED TO SENATE		
2/01	FIRST READING		
2/01	REFERRED TO BUSINESS & INDUSTRY		
3/08	HEARING		

3/09	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
3/11	2ND READING CONCURRED	39	0
3/13	3RD READING CONCURRED	49	0
	RETURNED TO HOUSE WITH AMENDMENTS		
4/03	2ND READING AMENDMENTS CONCURRED	93	5
4/04	3RD READING AMENDMENTS CONCURRED	92	7
4/06	SIGNED BY SPEAKER		
4/07	SIGNED BY PRESIDENT		
4/10	TRANSMITTED TO GOVERNOR		
4/13	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 409		
	EFFECTIVE DATE: 10/01/95		

HB 287 INTRODUCED BY REAM, ET AL.

PROVIDE THAT DEPARTMENT OF REVENUE IS A JUDGMENT LIEN CREDITOR

BY REQUEST OF THE DEPARTMENT OF REVENUE

1/20	INTRODUCED		
1/20	FIRST READING		
1/20	REFERRED TO TAXATION		
1/20	FISCAL NOTE REQUESTED		
1/23	SPONSOR FISCAL NOTE RECEIVED		
1/25	FISCAL NOTE PRINTED		
1/27	HEARING		
2/06	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/07	2ND READING PASSED	88	9
2/08	3RD READING PASSED	91	7
	TRANSMITTED TO SENATE		
2/20	FIRST READING		
2/20	REFERRED TO TAXATION		
3/08	HEARING		
3/09	COMMITTEE REPORT—BILL CONCURRED		
3/11	2ND READING CONCURRED	22	15
3/13	3RD READING FAILED	24	25
3/14	RECONSIDERED PREVIOUS ACTION AND PLACED BACK ON 2ND READING	35	15
3/23	2ND READING CONCURRED AS AMENDED	50	0
3/24	3RD READING CONCURRED	49	0
	RETURNED TO HOUSE WITH AMENDMENTS		
3/31	2ND READING AMENDMENTS CONCURRED	88	8
4/03	3RD READING AMENDMENTS CONCURRED	94	5
4/05	SIGNED BY SPEAKER		
4/06	SIGNED BY PRESIDENT		
4/07	TRANSMITTED TO GOVERNOR		
4/12	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 365		
	EFFECTIVE DATE: 04/12/95		

HB 288 INTRODUCED BY MARSHALL, ET AL.

PROVIDE THAT A PERSON WHO TAKES A MOUNTAIN SHEEP USING AN UNLIMITED MOUNTAIN SHEEP LICENSE, WITH THE EXCEPTION OF A MOUNTAIN SHEEP TAKEN PURSUANT TO AN ADULT EWE LICENSE, IS NOT ELIGIBLE TO RECEIVE ANOTHER SPECIAL LICENSE FOR THAT SPECIES FOR THE NEXT 7 YEARS

1/20	INTRODUCED
1/20	FIRST READING
1/20	REFERRED TO FISH & GAME
1/31	HEARING

INTRODUCED BY [signatures]

HOUSE BILL NO. 286

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THAT IT IS AN UNLAWFUL ACT FOR ANY BREWER OR BEER IMPORTER TO COERCE OR ATTEMPT TO COERCE A BEER WHOLESALER TO SET A PRICE FOR ANY PRODUCT; AND AMENDING SECTION 16-3-221, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 16-3-221, MCA, is amended to read:

"**16-3-221. Illegal acts by brewers or beer importers.** It is unlawful for any brewer or beer importer or any officer, agent, or representative of any brewer or beer importer to:

(1) coerce, ~~or~~ attempt to coerce, or persuade any person licensed to sell beer at wholesale to set a price for any product or to enter into any agreement or to take any action ~~which~~ that would violate or tend to violate any of the laws of this state or any rules promulgated by the department;

(2) sell its products in the state without a written contract, which conforms to the provisions of 16-3-221 through 16-3-226, with each appointed licensed wholesale distributor;

(3) designate or allow more than one wholesale distributor to sell or distribute a specific brand of the brewer's or beer importer's products to retail licensees in the same area, provided that nothing ~~herein shall prohibit~~ in this part prohibits the brewer or beer importer from designating more than one wholesale distributor to sell or distribute different brands of the same manufacturer to retail licensees in the same area; and

(4) cancel or terminate, except for just cause or in accordance with the current terms and standards established by the brewer or beer importer then equally applicable to all wholesalers, any agreement or contract, written or oral, or the franchise of any wholesaler existing on January 1, 1974, or ~~thereafter~~ entered into after that date to sell beer manufactured by the brewer or imported by the beer importer. A brewer or beer importer may, notwithstanding the preceding sentence, make reasonable classifications among wholesalers. If a brewer or beer importer cancels or terminates a wholesaler's franchise, the brewer or beer importer has the burden of proving that the classification was reasonable and not arbitrary. After July 1, 1974, the provisions of 16-3-221 through 16-3-226 ~~shall~~ must be a part of any

franchise, contract, agreement, or understanding, whether written or oral, between any wholesaler of beer licensed to do business in this state and any manufacturer or beer importer doing business with the licensed wholesaler just as though the provisions had been specifically agreed upon between the wholesaler and the manufacturer or beer importer."

-END-

systems. If this bill were to pass, the burden of proof may fall on the insurance salesman when asked to prove that they held a license in Montana for the past 35 years. **Mr. Shannon** said this could be proven through the company in which he was employed. The continuing education credits were proven to them.

CHAIRMAN SIMON asked what would happen if an agent were to move around and not stay with the same company. How would they prove their employment? **Mr. Shannon** said they could contact the other companies in which they had been employed.

Closing by Sponsor:

The sponsor closed.

HEARING ON HB 286

Opening Statement by Sponsor:

REP. BOB PAVLOVICH, HD 37, Silver Bow County said this is a bill which clarifies the laws governing the relationship between brewers, beer importers and wholesalers. The substance of the bill appears on page 1. This bill will prohibit a brewer or importer from setting a price for a product sold at wholesale by a beer distributor. The distribution of alcoholic beverages is one of the most regulated industries in our community. The relationships between producers, wholesalers and retailers are subject to an enormous regulation by both the federal government and state government. The distribution of the alcoholic beverages is in a three-tier system. In that system, brewers are prohibited from controlling wholesalers and wholesalers are prohibited from controlling retailers. Federal and state laws in essence prohibited control over one tier by another. This bill will establish the prohibitation by expressly forbidding brewers from setting the wholesale price on any product.

Proponents' Testimony:

Tom Hopgood, Montana Beer and Wine Wholesalers Association provided written testimony. **EXHIBIT 4**

Don Brocopp, explained the history of the three-tier system. He then indicated his support of this bill.

Bill Watkins, President, Zip Beverage stated in the ever-increasing competitive beer market, it is the responsibility of the distributors to provide the right price, timely delivery, a guarantee of freshness and an ongoing merchandising effort. He said they had a right to earn a fair margin on the items they present to retailers.

Opponents' Testimony:

Steve Browning, Anheuser Busch Companies said current state and federal laws already protect wholesalers, and these laws do not need changing. This proposal, if enacted, would unfairly restrain the commercial activities of brewers. **EXHIBIT 5**

Questions From Committee Members and Responses:

REP. LARSON said he wished to explore the relationship concerning retailers. Cosco apparently contacts Busch to buy a carload of beer if the price is right. **Mr. Watkins** said he was not obligated to sell at the price quoted but that is how the dialogue works. They have sales representatives that make corporate calls. They facilitate the purchase of their product through their system. **REP. LARSON** then asked when the beer left the brewery does it go directly to the purchaser? **Mr. Watkins** said the order passes through their warehouse.

REP. LARSON said small retailers are at the mercy of the large retailers. They are underselling the small business. As a bar owner, he said he could go to Cosco and buy beer for less than the wholesaler sells to him. **Mr. Watkins** said effectively when the price is posed to an individual the price is offered to everybody. **REP. LARSON** then asked if beer was sold to Cosco for the same price as it is sold to him. **Mr. Watkins** said yes, that is the way the system works.

REP. MARSHALL said it had been suggested to him that some of the bigger brewers go to the large grocery stores and request "X" many feet of shelving. To buy the shelving, the brewery is forced to pay the store a commission or price for the shelving and thereby not have to reduce the price of the product. **Mr. Watkins** said the grocery business sells their space. The alcohol business is prohibited from purchasing that space and has been since the days of prohibition. The brewery representatives will sell the service. They sell on time delivery, merchandising, the point of sale, the packaging. They do not purchase the space.

CHAIRMAN SIMON asked for an explanation of Anheuser Busch continuing to oppose this bill with this amendment. **Mr. Browning** said because the bill would still state that it is a violation of state law to set a price for a product. There is so much federal jurisprudence on this. There are lawyers in all of the major companies who are paid to make sure that they do not get themselves in situations where they are subjected to federal damages. They vigorously oppose this bill even with the amendment. There is no way they can support the bill where it has language in it about brewers setting prices.

REP. LARSON said in the last paragraph of his written testimony it discusses the affiliation of the Department of Revenue and the brewer/wholesaler relationship. **Mr. Browning** said it is complicated for an out-of-state entity to deal with a variety of

different entities. Dealing with the state can be difficult. They are subjected to someone who would raise a complaint and there follows an administrative proceeding of some type. It is costly and it is just an unnecessary complication that could not have otherwise been worked out between the two parties to the contract.

CHAIRMAN SIMON said he was still not clear. It seems as if the company would want to stay as far away from any kind of suggestion that they were somehow trying to force the setting of prices. This language says it is unlawful to coerce or attempt to coerce or persuade anybody the license to sell beer at wholesale to set prices. "You don't do that and you don't want to do that? Your people would want you to stay as far away as possible. You could, under this amendment, suggest some prices but not put any pressure on that wholesaler to do anything other than run their own business." Anheuser Busch would want to stay away from that situation as much as possible because there is so much federal law involved in this area. Any suggestion they might have in a position to leverage a wholesaler using coercion would be something they would want to avoid. **Mr. Browning** said if the amendment were to the law as currently written they would not have a problem with it. The problem they have is with the bill as written. With the underlying portions they cannot live with this. They would agree on a common sense reading. They want to do anything they can to avoid liability. They need to run their business.

CHAIRMAN SIMON said it was very curious when it is said that adding the words "set a price for a wholesale for any product" and it is unlawful to coerce, attempt to coerce or persuade a person licensed to sell beer at wholesale and with the price clause it almost sounds like they don't want it. It does not come across to him it is an illegal activity. Why would they object to this? **Mr. Browning** said he understood the question. After spending several hours reading six U.S. Supreme Court decisions regarding anti-trust law, "lawyers can make a thousand angels dance on a head of a pin." It is unbelievably complicated in that they must be very careful about what they do, what they say, what words are written. They say this bill is a real problem even with the amendment. **CHAIRMAN SIMON** said he felt he was hearing two different things but appreciated the testimony.

REP. ELLINGSON said Anheuser Busch was the only brewer here. All of the national brewing companies would be affected by this bill, yet they don't appear to have any problem. Is that a fair deduction that can be reached from the fact none of them are here opposing this bill? **Mr. Browning** said he did not think it was a fair conclusion. He said he had not spoken with the other brewers. The beer business is not a good business. Nationally, beer sales have been declining for some years. It is a tough business and is an enormously competitive business. A number of the brewers have a great deal of difficulty surviving. Their market shares are going down, their sales are going down, as is

their stock. Like many entities in America they are restructuring.

Closing by Sponsor:

The sponsor closed.

HEARING ON HB 310

Opening Statement by Sponsor:

REP. JOE BARNETT, HD 32, Gallatin County stated he was carrying this bill per the request of Montana Power Company. The purpose of this bill is to allow regulated utilities to recover the Montana Consumer Council (MCC) tax in the same timely manner as they are allowed to recover the Public Service Commission (PSC) tax. In the Public Service Commission funding statute, a regulated utility is allowed to recover immediately, through its rates and charges, any amounts paid in PSC taxes. However, though the MCC tax is the same nature and character as the PSC tax, a regulated utility may not recover the MCC tax until a general rate case is filed and a final PSC order has been issued. Because regulated utilities do not necessarily file a rate case every three years, they can be delayed in recovering the MCC tax for lengthy periods of time. This bill simply equalizes the way the MCC tax is recovered with the way regulated utilities are allowed to immediately recover the PSC tax.

Proponents' Testimony:

Tom Matosich, Montana Power Company supplied amendments which determine the funding statute for the MCC. The funding statutes impose taxes on regulated utilities in Montana to fund the PSC and the MCC. The PSC funding statute has language that says "All fees paid by the regulated company pursuant to this section are immediately recoverable by the regulated company in its rates and charges." The proposed amendment would allow the same immediate recovery in rates of the MCC tax. **EXHIBIT 6**

John Alke, Montana-Dakota Utilities said they supported this bill. In regard to the gas rates, there is the current MCC tax rate and the current PSC tax rate in place because there was a 1994 rate case. However, on the electric side, there has not been an electric rate case since 1986. The electric rates are the 1994 PSC tax rates in effect and the 1986 MCC rates in effect. Actually, they are over-collecting by over $6,000 than is necessary but because of the difference in the tax statutes that is the way it goes. They do not feel the company nor the rate payers should make money from this tax. Whatever it is, that should be the rate and the only way to accomplish that is to keep the PSC tax provisions to the MCC tax.

Barbara Ranf, U.S. West stated she supported this bill as well.

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Montana Beer & Wine Wholesalers Association
Post Office Box 124 • Helena, Montana 59624 • Telephone (406) 442-4451

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January 26, 1995

HOUSE BUSINESS AND LABOR COMMITTEE
STATEMENT IN SUPPORT OF HB-286

The Montana Beer & Wine Wholesalers Association is composed of small businessmen and women from across the state. Our membership includes almost every beer and wine wholesaler in Montana.

The beer distribution industry is highly competitive as we see from watching prime TV or any sporting event. The "Right Beer Now," "Tastes Great-Less Filling" and "This Bud's For You" are household phrases.

The competition for market share is especially intense among local distributors. In any given community, you will probably find two or three or even four major beer distributors, one for Anheuser Busch, one for Miller, one for Heilman and one for Coors. The distributors compete for shelf space in stores, sponsorship of sporting and charity events and consumer loyalty. A key part of this competition is pricing products to sell at the wholesale level. For wholesalers to compete it is essential that they have absolute independence to set, maintain and when necessary, to change the wholesale price of their products to meet the conditions of the market.

On top of the competitive pressure which wholesalers have, each wholesaler must meet his or her payroll, pay the mortgage, service all the vehicles, maintain the warehouse, pay insurance

TOM K. HOPGOOD, Helena
Executive Secretary/Counsel

premiums and, most important, pay the brewery for his product. In short, it is the wholesaler who knows his business and knows his market and is best able to set the wholesale price of his product. The wholesaler should be able to sell his product without undue influence from the brewer or importer.

In this highly competitive industry, we have generally found that wholesalers' price increases do not exceed cost increases. In fact, recent years have seen the profit margin for beer wholesalers actually decrease as cost increases exceed price increases.

What we are attempting to clarify with this bill is that brewers or importers may not set or maintain wholesale prices and may not retaliate against wholesalers who do not follow a suggested wholesale price. What we are most concerned with is a predatory pricing practice called "reach back pricing."

Reach back pricing occurs when a brewery increases its price by, for example, 25¢ a case. The brewer suggests the wholesaler impose a 25¢ increase. The wholesaler, however, in response to his individual overhead or the competition in his individual market, decides that he must increase the price by 35¢. The brewer unilaterally determines the 35¢ increase to be improper as it would result in excessive profit to the wholesaler. To coerce the wholesaler to limit its price increase, the brewer retaliates by a further price increase. It is the retaliation we seek to prohibit.

We understand that certain breweries oppose this bill on the ground that if it is passed, it will prohibit breweries from

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"suggesting" wholesale prices or from "discussing" wholesale prices with wholesalers.

We understand the brewers' need for market coordination and for brewer originated price promotions. It is advantageous for wholesalers to have brewers and importers "suggest" wholesale prices and for us, as wholesalers, to "discuss" wholesale prices with brewers. We do not intend that this bill will prohibit either price suggestion or discussion and we do not believe it is capable of that construction.

Nonetheless, to alleviate the expressed concerns, we would propose an amendment to provide that nothing in the beer statutes prohibits a brewer or importer from "suggesting" a wholesale price or from "discussing" wholesale prices with distributors.

Thus qualified, it is abundantly clear that we seek to prohibit only the truly coercive acts of brewers and importers, those acts which we can legitimately label as retaliatory.

This bill allows Montana businessmen and women to control their business and to compete fairly with one another in the market place. It fosters healthy competition without undue outside controls.

We ask your favorable endorsement of HB-286.

Respectfully submitted,

Tom K. Hopgood
Executive Secretary/Counsel

TKH/jb

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House Committee on Business and Labor
Testimony by R. Stephen Browning
on House Bill 286
On behalf of Anheuser-Busch Companies
January 26, 1995

I appear today on behalf of Anheuser-Busch Companies (AB) to oppose HB 286. AB opposes HB 286 for two reasons: First, current state and federal laws already protect wholesalers, and these laws do not need changing; Second, this proposal, if enacted, would unfairly restrain the commercial activities of brewers, including my client.

Before explaining more about the basis of AB's opposition, it may be helpful to review briefly for the Committee the nature of the relationships that currently exist in Montana among brewers, beer wholesalers, and beer retailers. To describe these relationships, several key concepts are used, including the terms control, exclusive territories, three tier system, and reach-back pricing.

Control: Montana is a "control state", which means that beer sales are controlled by statute. Section 16-3-101, MCA, prohibits brewers, like AB, from selling beer within Montana except as allowed by Montana law.

Exclusive Territories: Beer wholesalers in Montana have "exclusive territories" in which they can sell a given brand to retailers as required by Section 16-3-222 MCA. That same statute provides that the sale of beer in Montana is governed by contractual agreements between the brewers and wholesalers.

Three Tier System: Montana's beer sales arrangement has been described as a "three-tiered system," which means that brewers and retailers are separated by wholesalers. Section 16-30-230 MCA requires that all out of state beer brought into Montana by brewers must go first to wholesalers, and wholesalers in turn sell to retailers.

Reach-Back Pricing: This is a situation where a brewer tells a wholesaler that a particular beer must be sold at a recommended price, and if the wholesaler exceeds that recommended price, then the brewer would

"reach back" and charge the wholesaler an additional amount equivalent to the excess price. For example, if a brewer raises its prices by, say, a nickel a case and recommends that the wholesaler charge no more than eight cents a case, and if the wholesaler charges a dime, then under a "reach back" the brewer would retroactively charge the wholesaler an additional two cents. Reach back pricing is currently illegal.

Anheuser-Busch honors the three tier system and does not set resale prices to be charged by wholesalers. Although AB will recommend prices to its wholesalers, it has never requested repayment of prices in excess of any wholesale price that Anheuser-Busch might have recommended.

Further, Anheuser-Busch does not engage in reach back pricing. Theoretically, "reach backs" involve the brewer retroactively increasing its prices, and raising the wholesaler's prices the full amount by which the wholesaler exceeded the brewer's recommended price. AB does not reach back on pricing.

HB 286 seeks to amend the Montana statute entitled "illegal acts by brewers." This law prohibits the alleged practices from which Montana's beer wholesalers are seeking protection. I point your attention to the actual text of the law, which is the non-underlined portions. The existing law, without the amendments suggested by HB 286, make it unlawful for brewers or their agents or representatives:

> "to coerce or attempt to coerce or persuade any person licensed to sell beer at wholesale to enter into any agreement or to take any action that would violate or tend to violate any of the laws of this state or any rules promulgated by the department."

As will be pointed out, "price fixing" is illegal under federal law, and Montana law already prohibits brewers from engaging in illegal activities. In fact, as pointed out before, Montana law prohibits brewers from even selling to retailers, much less seeking to set prices to retailers.

Federal law prohibits brewers and other manufacturers from setting prices for products and to require the wholesaler to sell those products at a price set by the brewer. "Price fixing" is a crime under federal law. Price

fixing is not only a crime under federal law; it is also an antitrust violation that creates a cause of action for treble damages by private parties. Federal laws are very clear as to what constitutes "fixing or maintaining" resale prices, and any violations of those laws are already subject to this statute. These laws are not idle, toothless, and unused statutes. They are not like "spitting on the sidewalk" crimes. They are used, and they can cost defendants huge sums.

Thus, since it is already currently illegal under both state and federal law for brewers to set prices, HB 286 is unnecessary.

I have been told by AB's legal office that no national brewers engage in reach back pricing. Although there have been informal suggestions by wholesalers to the effect that other brewers besides Anheuser-Busch engage in reach back pricing, to my knowledge, no reach-back allegations have ever been formally made.

The reason that there is no reach-back pricing, likely, is because such practices are illegal under federal law, as well as under Montana state law. If in fact a brewer retroactively increases its prices to a wholesaler that has exceeded the brewer's recommended resale price, the wholesaler has a clear right of action under state and federal antitrust law. As noted previously, such an action would entitle the wholesaler to receive treble damages from the brewer.

Similarly, if a brewer were to raise a wholesaler's price the full amount by which the wholesaler has exceeded the brewer's recommendation that, too, would give the wholesaler a legal right of action under state and federal law to sue the brewer. That action would also entitle the wholesaler to receive treble damages from the brewer.

Also, if a brewer were to notify the wholesaler that it intends to raise the wholesaler's price every time the wholesaler raises its prices to retailers that, again, would be a violation of federal antitrust law.

Anheuser-Busch, like all manufacturers, experience increases in costs and examine the marketplace to determine whether its products are being sold at a price that would justify Anheuser-Busch raising its prices to meet increased costs. This is always done after a significant amount of time has passed since

the last price increase to allow AB adequate time to evaluate the effects of those price increases on the marketplace.

Anheuser-Busch would never raise its prices to take the full amount by which a wholesaler has exceeded a recommended price to a retailer. However, AB must retain its flexibility to determine how much it charges for its products. The actual price of products charged to retailers is entirely within the province of wholesalers, because, as noted before, Anheuser-Busch does not sell to retailers, only to wholesalers.

Another essential piece of information for the Committee to consider is the fact that there is effectively no competition among wholesalers in Montana. The reason for that is that by state law, wholesalers have been given exclusive territories, and those territories have been formally established by contract with the brewers. This situation occurred thirteen years ago, and since 1982 Montana beer wholesalers in Montana have exclusive control over the prices charged in their markets.

At the same time, Anheuser-Busch spends hundreds of millions of dollars annually advertising its products, which is does for the purpose of increasing sales of its products to retailers by AB wholesalers. Since wholesalers have the ultimate control over the price charged to retailers, it is essential that Anheuser-Busch at least maintain the right to recommend resale prices from wholesalers to retailers.

Anheuser-Busch's recommendations on resale prices would be based on information provided to Anheuser-Busch by its wholesalers, as well as AB's analysis of the marketplace. AB's wholesalers are free to follow or ignore AB's recommendations as they see fit.

However, under the language proposed by HB 286, even a resale price recommendation could be construed as a "attempt" to coerce or persuade a wholesaler to set a retail resale price. That would be another violation of Montana law.

It should also be pointed out that many AB wholesalers have retail accounts who sell in the territory of adjoining AB wholesalers. Those retailers typically will not feature any of our products in their ads unless they can get

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a common price from the various wholesalers that service them. It is unlawful for wholesalers to meet and discuss these matters. Thus, Anheuser-Busch representatives gather the pricing information from the wholesalers and pass it on to the retailers. Under the revisions proposed by HB 286, AB's activities would be illegal. That is, any time that an AB field representatives would advise wholesalers with statements like "Buttreys will run our cases in their Sunday feature if they can get a price of $7.80," AB would have committed a crime if HB 286 is enacted. And, this would impair AB's ability to effectively market its products in Montana.

In conclusion, Anheuser-Busch does not fix or maintain prices at which wholesalers resell AB's products. Nor does AB require wholesalers to meet any price. The language as proposed by HB 286, however, would prevent AB from even suggesting such a price. And it would prevent AB from arguing with its wholesalers that a lower price might in fact generate additional volume. Any such efforts of this type could be construed as an attempt to coerce or persuade the wholesalers and would be a violation of law under HB 286 as proposed.

Finally, and perhaps most damaging, HB 286 would further insert the Montana Department of Revenue into the brewer - wholesaler relationship. Such intrusion would enable any wholesaler who is dissatisfied with our pricing activities to put at risk our license to sell our products in Montana. Such an outcome is totally unacceptable to Anheuser-Busch, and therefore AB vigorously opposes this bill. Please vote do not pass on HB 286.

Thank you for the opportunity to present this testimony to the Committee.

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

Business & Labor — Rep. Pavlovich — DATE 1/26/95

BILL NO. HB 286 SPONSOR(S) Rep. Pavlovich

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	Support	Oppose
Tom Hopgood	Mt. Beer & Wine	✓	
Don Broccoff	MT Beer & Wine	✓	
Steve Browning	Anheuser Busch		✓
Bill Watkins	Mt Beer & Wine	✓	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

whether to specify an amount. Because the composition of the study is not addressed in the resolution itself, it is not known how many meetings will be held, who is going to participate, who is and is not going to get paid and that $5,000-$10,000 is not going to buy much of study. That is the risk of setting a number. Unless there is an understanding from the banking people they are willing to pay whatever is required.

REP. DON LARSON asked if language could not be inserted in the bill that it would be understood the banking community will fund the entire cost.

CHAIRMAN BRUCE SIMON stated they did want to have some kind of a bracket around the figure because there might be a $50,000 study and they are not willing to pay that kind of money.

REP. JOE BARNETT said he agreed they were going to do this study anyway and suggested this bill be tabled which would take pressure off the committee.

REP. LARSON said in regard to some of the activities which are taking place in regard to the budget, they may not be able to conduct the study anyway.

REP. VICKI COCCHIARELLA questioned whether the committee could ask each group to report to the committee their own findings sometime before the next session.

CHAIRMAN SIMON stated he could have a letter from the committee requesting both sides to share the results of their independent study of the issue. He said he was sensing there was not enough support on the committee to pass the resolution out and so he was hesitant to have the staff invest any more time in the issue.

Motion/Vote: **REP. BARNETT MOVED TO TABLE HJR 14. Motion carried 14-4 with REPS. ELLINGSON, PAVLOVICH, DEVANEY and ELLIS voting no.**

Motion/Vote: **REP. COCCHIARELLA MOVED TO HAVE A LETTER COMPOSED TO THE MONTANA BANKERS ASSOCIATION AND THE MONTANA INDEPENDENT BANKERS ASSOCIATION WHICH WOULD CONTAIN ANY INFORMATION WHICH MIGHT BE PROVIDED TO THE COMMITTEE CONCERNING RESEARCH THEY DO BEFORE THE NEXT SESSION. Motion carried 18-0.**

EXECUTIVE ACTION ON HB 286

Motion: **REP. BOB PAVLOVICH MOVED HB 286 DO PASS. REP. PAVLOVICH ALSO MOVED THE HOPGOOD AMENDMENTS.**

Discussion:

Steven Maly explained the Hopgood amendments.

REP. LARSON said he supports the amendment because it relieves much of the concern for Anheuser Busch.

REP. ALVIN ELLIS questioned if **Mr. Browning** had commented on the amendment.

REP. JON ELLINGSON stated in sub-section 1 it is prohibited that anyone persuade any person to set a price and then the amendment says the wholesaler can suggest a price. He asked "Is this stating that they can't persuade, but can suggest?"

REP. ELLIS said this may be a good enough point that the committee should revise the bill.

Vote: **Motion carried 18-0 to adopt the Hopgood amendments.**

Motion: **REP. ELLIS MOVED TO ADOPT THE ELLIS AMENDMENT.**

Discussion:

CHAIRMAN SIMON stated he spoke against the amendment because "persuade" is a very strong term and "suggest" is a passive term.

REP. PAVLOVICH said he agreed on the Ellis amendment.

REP. LARSON said the beer brewers come in and are heavy handed with the wholesalers. They indicate what they are selling and handle the invoicing. That is the way they do it. This bill is intended to stop that.

Vote: **Motion carried 17-1 to adopt the Ellis amendment with CHAIRMAN SIMON voting no.**

Motion/Vote: **REP. PAVLOVICH MOVED HB 286 DO PASS AS AMENDED. Motion carried 18-0.**

EXECUTIVE ACTION ON SB 67

Motion: **REP. PAVLOVICH MOVED SB 67 BE CONCURRED IN. REP. PAVLOVICH MOVED THE LYNCH AMENDMENT.**

Discussion:

REP. PAVLOVICH explained the amendment.

CHAIRMAN SIMON questioned the retention of the 70 years of age.

REP. PAVLOVICH said that should be omitted.

CHAIRMAN SIMON then said anyone 30 years in the business in Montana would be exempt from the requirements of continuing education.

HOUSE STANDING COMMITTEE REPORT

January 27, 1995

Mr. Speaker: We, the committee on **Business and Labor** report that **House Bill 286** (first reading copy -- white) **do pass as amended.**

Signed: *Bruce Simon, Chair*

And, that such amendments read:

1. Page 1, line 13.
Following: first "coerce"
Strike: ","
Following: "~~er~~"
Insert: "or"
Following: second "coerce"
Strike: ", or persuade"

2. Page 1, line 15.
Following: "department"
Strike: ";"
Insert: ". However, nothing in this part prohibits a brewer or beer importer from suggesting wholesale prices for products to distributors or from discussing wholesale prices with distributors."

-END-

1/27

Committee Vote:
Yes 18, No 0.

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said the Department of Revenue supported HB 549 and she asked the committee's support as well.

Opponents' Testimony: None.

Questions From Committee Members and Responses:

SEN. STEVE BENEDICT asked **Gary Blewett, Liquor Division, Department of Revenue,** if he agreed and he said he did.

SEN. MIKE SPRAGUE asked if HB 549 would be a cause-and-effect situation, i.e. hearing from small businesses at home because they didn't know anything about the bill. **Mr. Blewett** said there would not be a chain reaction cause-and-effect because there was no competition for the licenses.

Closing by Sponsor:

REP. SHEA asked the committee's support for HB 549.

HEARING ON HB 286

Opening Statement by Sponsor:

REP. BOB PAVLOVICH, HD 37, Butte, said the beer industry was a three tier industry; manufacturer, wholesaler, and retailer. He said the purpose of HB 549 was to stop the brewer from coercing the wholesaler to set a price; however, it would be permissible to get together and suggest prices. He distributed copies of amendments, EXHIBIT #2. **REP. PAVLOVICH** said HB 286 strengthened the separation between brewers and wholesalers, kept brewers from controlling wholesalers, kept brewers from setting prices, allowed the marketplace to set the price through supply and demand, furthered the enterprise system and maintained competitive pricing among wholesalers.

Proponents' Testimony:

Tom Hopgood, Montana Beer and Wine Wholesalers Association, expressed appreciation to the committee for its courtesy throughout the session. He said HB 286 would clarify that brewers were prohibited from setting the prices for products sold at wholesale by beer distributors. **Mr. Hopgood** said there was some opposition from one of the major breweries, and a discussion with them produced the amendments in EXHIBIT #2. He said the concern was when a brewer came to a wholesaler to say he would raise the price, suggesting the wholesaler raise his price no more than a certain amount, though the wholesaler may need to increase it more. **Tom Hopgood** explained in the past, when the above happened, it was the tendency of the brewers to declare to the wholesaler if they raised the price by a certain amount, the brewers would raise theirs by a certain amount, i.e. brewery

influenced the wholesaler's price. He remarked the distributor, according to statute, was free to set his or her own retail prices. **Mr. Hopgood** said the amendments would take care of the reach-back pricing and would allow the brewers ease with **HB 286.**

Harry Watkins, President, Montana Beer and Wine Wholesalers Association, said his organization supported **HB 286** because sometimes wholesalers found it necessary to raise the prices more than recommended by the major breweries they represented. He said from a legal standpoint, wholesalers had a weak contractual right to the brands they represented; therefore, they usually agreed with the brewery recommendations. **Mr. Watkins** said the breweries usually felt a nickel or dime increase per case should be good for every wholesaler; in reality, every wholesaler had a different financial profile. **Mr. Watkins** said the marketplace was the best indicator of the size of increase.

Opponents' Testimony: None.

Questions From Committee Members and Responses:

SEN. MIKE SPRAGUE asked if there was a chart or graph to illustrate the reach-back effect. **Harry Watkins** drew an illustration on the blackboard to explain.

SEN. SPRAGUE commented the wholesalers were asking for flexibility and competitiveness and that was what saved the consumer. **Tom Hopgood** agreed, explaining the beer wholesale business had interbrand competition which kept the prices down.

SEN. STEVE BENEDICT asked if there was more sympathy toward the wholesalers instead of the large out-of-state corporations which try to influence Montana prices, would it be better to not adopt the amendments, but go with **HB 286. Mr. Hopgood** said the bill would have prevented the brewers retaliating against the distributor raising the wholesale more than the brewers suggested. He said Anheuser Busch had discomfort with the introduced language; therefore, it was suggested the language be added that nothing could be construed as to prevent a brewer from suggesting prices. **Mr. Hopgood** said they agreed the language in Amendment #5 adequately addressed the problem of reach-back pricing. He said if it was desired to ignore big brewery influence, the amendment should be left off; however, he was not advocating that. He said though the bill was not the optimum, both Anheuser Busch and his organization could live with it.

SEN. BENEDICT asked **Steve Browning** what response would Anheuser Busch have if in addition to not adopting these amendments, but also returning the bill back to its original state as it was introduced. **Mr. Browning, Anheuser Busch,** stated the reason they didn't like the bill as introduced, not as amended, was because the parameters or requirements were not included; the language was coercive, ambiguous, and really didn't list what could be done or could not be done. They were okay with the prior law as

they knew what the parameters were and could live with those parameters. **Mr. Browning** said they were prepared to accept additional requirements as long as they knew what those requirements were and how they could conduct their business.

SEN. CASEY EMERSON questioned **Mr. Hopgood** about enforcing the Fair Trade Act of the federal government, where every wholesaler could purchase from any brewer they wished. **Mr. Hopgood** stated this issue had been addressed. He said after prohibition was repealed, Congress enacted the three tier system which had the producer of the alcoholic beverage (the brewery), the distributor, and the retailer. There was a very distinct line between the brewer and the distributor and a very distinct line between the distributor and the retailer, and he said that was to prevent the brewery from obtaining too great a control over the retailer. He stated it prohibited companies like Anheuser Busch from opening up their own chain of bars all across the country. He explained the middle tier worked through interbrand competition, rather than the intrabrand competition.

Mr. Hopgood related the economics of beer distribution, exclusive territories, and interbrand competition were incredibly complex; it had been debated and discussed. He commented there was only one state in this country that had intrabrand competition and that was Indiana and they were having difficulties, with attempts in the Indiana legislature to remedy that problem. He contended interbrand competition was a system of distribution in the beer business that worked. He reported it protected the retailer from the brewer, it protected the retailer from the distributor and in the final analysis, it protected the consumer.

SEN. EMERSON told **Mr. Hopgood**, he really didn't believe that and thought the market took care of that better than the three tier system. He thought the free market system was by far the best step. **SEN. EMERSON** stated he was going to be in Indiana in a few months and was going to check their system. **Mr. Hopgood** contended beer distributors, as a group, were generally believers in free enterprise and that was what they were conducting; free enterprise of Anheuser Busch against Miller against Coors, etc. within the same territory. He remarked they believed that was as much free enterprise, interbrand competition, as it would be in intrabrand competition.

SEN. BENEDICT commented to **Mr. Hopgood**, he thought it should be brought out and was appropriate the present system was set up to avoid cherry-picking by the distributors as far as just carrying popular brands of beer and not carrying the full line. **Mr. Hopgood** remarked that was absolutely correct.

Closing by Sponsor:

REP. PAVLOVICH stated he would concur with the amendments. In reference to the free enterprise system **SEN. EMERSON** was talking about, a few years ago they had a strike of the retailers in

Butte, along with the Teamster's. They had a problem getting beer. They had to go to Bozeman and Great Falls to purchase their beer as they didn't dare cross the picket line being from a union town. He declared after about two weeks, the wholesalers in Butte informed the wholesalers elsewhere not to sell them any beer. **REP. PAVLOVICH** maintained they had to come back to the legislature to adopt a rule that said as long as a person owns an "all beverage license", the wholesaler must sell the beer.

HEARING ON HB 342

Opening Statement by Sponsor:

REP. BOB PAVLOVICH, HD 37, Butte, said **HB 342** was a wine distributor bill. In 1991 the legislature enacted section 16-3-416, MCA which contained statutory safeguards for wine distribution contracts. The safeguards were enacted because of an unfair practice of wineries in dealing with Montana wine distributors. He explained among other provisions, the 1991 law required wineries to give 60 days notice of contract termination for reasons other than bankruptcy or loss of license. He stated the law allowed the terminated distributor 60 days to cure any deficiency in his performance of the wine distributor contract.

REP. PAVLOVICH explained the law also required the supplier to pay for the laid-in cost of inventory and for the liquidation damages of termination. He said what had occurred since 1991, (time of enactment of the law) some wineries had resorted to the preparation of contracts which were contrary to the Montana statutes. They had contracts with wineries that were made out-of-state and did not conform to Montana law. He said **HB 342** stated when they sold wine in the State of Montana, they would have a contract made in Montana under Montana law.

Proponents' Testimony:

Tom Hopgood, Montana Beer and Wine Wholesalers Association, explained what had been experienced with the 1991 law was contracts being prepared by the wineries, which were one-sided in favor of the wineries. He said the problem was addressed by the legislature in 1991 to insert certain safeguards into the law governing the termination of contracts, the payment of liquidated damages and the opportunity to cure defects and performance, etc. They thought those were very important provisions.

Mr. Hopgood stated; however, the wineries were simply sidestepping the projections they had put into the statute by saying the contract was governed by, for example, the State of Washington, or the State of New York. He had a couple of contracts to show the committee, one being from the Stimson Lane Winery in Washington, which had a number of provisions that were completely contrary to the statutory projections in Montana law.

EXECUTIVE ACTION ON HB 549

Motion/Vote: SEN. STEVE BENEDICT MOVED HB 549 BE CONCURRED IN. The motion CARRIED UNANIMOUSLY by voice vote. SEN. GERRY DEVLIN will carry the bill on the Senate floor.

EXECUTIVE ACTION ON HB 286

Motion/Vote: SEN. STEVE BENEDICT MOVED TO ADOPT THE AMENDMENTS HB028601.ABC. The motion CARRIED UNANIMOUSLY by voice vote.

Motion/Vote: SEN. BENEDICT MOVED HB 286 AS AMENDED BE CONCURRED IN. The motion CARRIED UNANIMOUSLY by voice vote.

EXECUTIVE ACTION ON HB 342

Motion: SEN. STEVE BENEDICT MOVED HB 342 BE CONCURRED IN.

Discussion: SEN. WILLIAM CRISMORE stated HB 342 was redundant as it was already covered under the law.

SEN. BENEDICT said he thought the purpose of this bill was to bring the contracts into conformance with Montana law instead of allowing a contract to be executed in another state and under the laws of that state. SEN. BENEDICT stated the crux of HB 342 clarified when a contract was made with a Montana business in the State of Montana then the contract should conform to Montana law.

SEN. KEN MILLER inquired from Bart Campbell, when the contract was made with a New York company and their contract said it would be under New York law, how would HB 342 help those contracts. Mr. Campbell answered that was a complicated area of law. He said often contracts were written which specified which state's law would apply when the parties agreed.

SEN. CASEY EMERSON asked Mr. Campbell if there would be an enforcement problem when the company who signed the contract in Montana and were to abide by New York law; however, they decided to break the contract. He said would it be possible for those people in New York to enforce it out here in Montana. Mr. Campbell related they would be able to enforce it by going through a Montana court if they believed that provision of the contract applied to a New York law. SEN EMERSON stated if the company had followed Montana law when they broke the contract, the court would throw the case out. Mr. Campbell gave his personal opinion and stated had the contract been signed, knowingly, that it applied to New York law, the New York law would be applied to that case.

SENATE STANDING COMMITTEE REPORT

MR. PRESIDENT:
We, your committee on Business and Industry having had under consideration HB 286 (third reading copy -- blue), respectfully report that HB 286 be amended as follows and as so amended be concurred in.

Signed: John Hertel
Senator John R. Hertel, Chair

That such amendments read:

1. Title, line 6.
Following: first "coerce"
Strike: "or"
Insert: ","
Following: second "coerce"
Insert: ", or persuade"

2. Page 1, line 14.
Strike: "or"
Insert: ","
Following: "~~persuade~~"
Insert: ", or persuade"

3. Page 1, line 15.
Strike: "set a price for any product or to"

4. Page 1, lines 16 through 19.
Strike: "." on line 16 through "DISTRIBUTORS." on line 19
Insert: ";"

5. Page 1, line 26.
Strike: "and"
Insert: "(4) fix or maintain the price at which a wholesale distributor resells the brewer's or beer importer's products. Without limitation, it is a violation of this section if:
(a) after a wholesale distributor has exceeded a resale price increase recommended by a brewer or beer importer, the brewer or beer importer raises the price that it charges the wholesale distributor for those products within 60 days; or
(b) after a wholesale distributor has exceeded a resale price increase recommended by a brewer or beer importer, the brewer or beer importer raises the price that it charges the wholesale distributor in an amount proportionately larger than the amount that it raised the wholesale distributor's prices initially when compared to the resale price that it recommended

Amd. Coord.
Sec. of Senate
Senator Carrying Bill

to the wholesale distributor."
Renumber: subsequent subsection

-END-

SENATE BUSINESS
EXHIBIT NO. 2
DATE 3-8-95
BILL NO. HB 286

Amendments to House Bill No. 286
Third Reading Copy

For the Committee on Business and Industry

Prepared by Bart Campbell
March 7, 1995

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(b) after a wholesale distributor has exceeded a resale price increase recommended by a brewer or beer importer, the brewer or beer importer raises the price that it charges the wholesale distributor in an amount proportionately larger than the amount that it raised the wholesale distributor's prices initially when compared to the resale price that it recommended to the wholesale distributor."
Renumber: subsequent subsection

DATE March 8, 1995

SENATE COMMITTEE ON Business and Industry

BILLS BEING HEARD TODAY: HB 286 Rep. Pavlovich
HB 342 Rep. Pavlovich HB 549 Rep. Shea

< ■ > PLEASE PRINT < ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
Sarah Power	Buttrey's	549	✓	
Tom Hopgood	Mt. Beer Wine Wholesale	286 342	✓	
Harry Watkins	Zip Distributing	286 342	✓	
Bill Mackey		—		
Mona Jamison	WINE INST	342		✓
Steve Browning	Anheuser-Busch	286	✓ Amendments	

VISITOR REGISTER

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